STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY OLNEY,

Plaintiff/Appellee-Cross Appellant,

v

OAKLAND PEBBLE CREEK HOUSING ASSOCIATES,

Defendant,

and

MURRAY MANAGEMENT, INC.,

Defendant/Appellant-Cross Appellee.

UNPUBLISHED
July 15, 2014

No. 312255
Ingham Circuit Court
LC No. 2011-000812-NO

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant Murray Management, Inc. appeals the trial court's order denying its motion for summary disposition. We reverse and remand for entry of an order granting summary disposition to defendant.

During the daylight hours of September 23, 2008, defendant picked up a friend to drive her to a meeting. She said she did not see the recently installed parking stop in front of the parking space. When she returned to drop her friend off, it was dark and the parking lot was poorly lit, but she had her headlights on. She pulled into the same parking spot. She still did not see the parking stop. Plaintiff did not get out of her vehicle until she realized her friend had left a book behind. On her way to give her friend the book, she hit something with her foot, tripped and fell before she reached the sidewalk. Plaintiff said that she did not know what she tripped on until she returned the next day while it was light. Photographic evidence shows that the parking stop was a dark color, and the parking lot was a lighter, grayish color.

Defendant argues that the trial court erred in denying its motion for summary disposition because the condition was open and obvious as a matter of law and because plaintiff failed to establish the requisite causal connection.

"We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Generally, "a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But this duty does not extend to open and obvious dangers because an invitee should reasonably be expected to discover them. *Id*. (citation omitted). "Accordingly, the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id*.

> Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue. [*Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012) (internal quotation marks and citations omitted; emphasis in original).]

Thus, this Court must use an objective standard to determine whether an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Id*. "[L]iability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*." *Id*. at 455 (emphasis in original).

Although we conclude that plaintiff presented evidence from which causation could be inferred, we further conclude that the danger posed by the parking stop was open and obvious. It is undisputed that plaintiff parked by the parking stop over which she fell on September 23, 2008, while it was still daylight. Photographs of the parking stop taken after her fall clearly show that the parking stop was a darker color than the pavement so that it contrasted with the pavement. The submitted photographs also show that at unspecified times of the day, a tree cast shadows on the parking stop, lessening its visibility. But even if the parking stop in issue was in the tree's shadow when plaintiff first encountered it on September 23, with casual inspection, an average person with ordinary intelligence still would have been able to see this particular stop and other parking stops in the parking lot. Additionally, although the evidence indicates that when plaintiff fell, the parking lot was dark, with no outside lights nearby, plaintiff admits that the headlights on her car were turned on when she pulled into the parking spot. It is axiomatic that one of the primary purposes of a vehicle's headlights is to illuminate the path in front of a vehicle. Plaintiff also testified that when she left her car, her headlights remained on either because the engine was running or because the delay after turning the car off. Consequently, when plaintiff pulled into the parking spot and exited her vehicle after returning in the evening, everything in front of her vehicle, including the parking stop, was necessarily illuminated.

Under these circumstances, an average person with ordinary intelligence would have discovered the danger posed by the parking stop upon casual inspection. *Hoffner*, 492 Mich at 461. Thus, viewing the evidence in the light most favorable to plaintiff, we conclude that the danger was open and obvious.

Further, there are no special aspects to the danger that would nevertheless allow plaintiff's claim to proceed. There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463 (emphasis in original). In this case, plaintiff concedes that the danger posed by the parking stop was avoidable.

In *Lugo*, our Supreme Court explained that "an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm." *Lugo*, 464 Mich at 518. By way of example, the Court indicated that an unguarded 30-foot deep pit in a parking lot would have special aspects because of the high risk of severe harm. *Id*. The Court noted that there was a "substantial risk of death or severe injury to one who fell in the pit." *Id*. Here, the risk of tripping and falling because of a parking stop is a categorically different type of risk, both in nature and degree, than a 30-foot deep pit. The risk of the danger posed by a parking stop is not that of death or severe injury; therefore, plaintiff has failed to demonstrate any special aspect that would render the application of the open and obvious danger inappropriate.

Additionally, we reject plaintiff's cross-appeal, which argues that her claim is based on ordinary negligence because defendant's employees made the condition of the property more dangerous than it otherwise might have been so that the open and obvious doctrine is in applicable. See *Laier v Kitchen*, 266 Mich App 482, 493, 502; 702 NW2d 199 (2005). We disagree. Plaintiff's claim was for premises liability and did not sound in ordinary negligence. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises' possessor created the condition giving rise to the plaintiff's injury." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Here, even though plaintiff claims that defendant created the condition or made it more dangerous, her claim is that the dangerous nature of the physical condition of the premises caused her injury. This is a premises liability claim, and the open and obvious doctrine applies to bar it.

We reverse and remand for entry of an order granting defendant summary disposition. We do not retain jurisdiction. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens